

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation)	
of the)	
)	
DEPARTMENT OF FAIR EMPLOYMENT)	Case Nos.
AND HOUSING)	E 95-96-B-3926-00res
)	E 95-96-B-3926-01rs
v.)	C96-97-140
)	99-02
J & J KING OF BEEPERS,)	
a California Corporation; and)	
JUDA ALSEZH, as Owner,)	
Managing Agent, and as an)	
Individual,)	
)	
Respondents.)	DECISION
-----)	
-)	
)	
SONIA MERCADO,)	
)	
Complainant.)	
_____)	
_____)	
)	

The attached Proposed Decision is hereby adopted as the Fair Employment and Housing Commission's final decision in this matter. Pursuant to Government Code sections 12935, subdivision (h), and 11425.60, the Commission designates this decision as precedential.

Pursuant to its authority under Government Code section 11517, subdivision (b)(3), the Commission adds on page 18, at the end of line 15, the following sentences:

The objective severity of the harassment is judged from the perspective of a reasonable

person in the complainant's position,
considering all the circumstances. (Oncale
v. Sundowner Offshore Services, Inc. (1998)
523 U.S. 75 [118 S.Ct. 998, 1003].) The
trier of
fact's inquiry is guided by "[c]ommon
sense, and an appropriate sensitivity to
social context." (Ibid.)

Any party adversely affected by this decision may seek
judicial review of the decision under Government Code section
11523 and Code of Civil Procedure section 1094.5. Any petition
for judicial review and related papers shall be served on the
Department, the Commission, respondents, and complainant.

DATED: February 3, 1999

FAIR EMPLOYMENT AND HOUSING COMMISSION

LYDIA I. BEEBE

PHYLLIS W. CHENG

T. WARREN JACKSON

EUIWON CHOUGH

ANN-MARIE VILLICANA

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J & J KING OF BEEPERS,)	
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Respondents.)	PROPOSED DECISION
-----)	
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SONIA MERCADO,)	
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Complainant.)	

Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on July 28-30, 1998, in Los Angeles, California. Joseph H. Duff and Pamela J. Holmes, Staff Counsel, and Roger Konia, Law Clerk, represented the Department of Fair Employment and Housing. Kenneth Gross, Attorney at Law, represented respondents. Respondent Juda Alsezh and complainant Sonia Mercado were present for all days of hearing. The parties timely filed post-hearing briefs and the case was submitted on November 9, 1998.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On May 9, 1996, Sonia Mercado filed written, verified complaints with the Department of Fair Employment and Housing (Department) against J & J King of Beepers, a California Corporation, and Juda Alsezh, as an individual. The complaints alleged that, within the preceding year, Juda Alsezh and J & J King of Beepers discriminated against complainant on the basis of her sex, female, in violation of the Fair Employment and Housing Act (Act) (Gov. Code, §12900, et seq.). The complaints asserted that Juda Alsezh, the owner of J & J King of Beepers, sexually harassed complainant and then terminated her in retaliation for complainant's rejection of his sexual harassment.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h), of the Act. On May 8, 1997, Nancy C. Gutierrez, in her official capacity as the Director of the Department, issued an accusation against J & J King of Beepers (respondent J & J King of Beepers) and Juda Alsezh (respondent Alsezh), charging respondents with unlawful discrimination against complainant based on her sex, female, in violation of Government Code section 12940, subdivisions (a) and (h). The accusation alleged that respondent Alsezh, while acting in his capacity as owner and managing agent of respondent J & J King of Beepers, discriminated against complainant by verbally, visually, and physically sexually harassing her and by terminating her because of her resistance to the harassment, in violation of Government Code section 12940, subdivisions (a) and (h). The accusation also alleged that respondents retaliated against complainant in violation of Government Code section 12940, subdivision (f), by terminating complainant when she protested respondent Alsezh's unequal treatment, sexual harassment, and sex discrimination. Finally, the accusation alleged that respondents failed to take all reasonable steps to prevent harassment from occurring, in violation of Government Code section 12940, subdivision (i).

3. Respondent J & J King of Beepers, a California corporation with a retail store at 310 West Sixth Street, Los Angeles, California (Los Angeles store), provides electronic

paggers and paging services to its individual customers. Respondent J & J King of Beepers employs between 40 and 50 employees at the Los Angeles store. Respondent J & J King of Beepers is an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivision (h) (3) (A).

4. Respondent Alsezh is the owner and sole shareholder of respondent J & J King of Beepers. Respondent Alsezh has complete control of the Los Angeles store operations and employs managers at the store who report directly to him. Respondent Alsezh is an "employer" within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivision (h) (3) (A), and a "person," within the meaning of Government Code section 12925, subdivision (d).

5. In March 1995, complainant began working for respondent J & J King of Beepers as a data entry clerk at the Los Angeles store. Complainant's pay rate was \$8.00 per hour. Complainant's duties included computer data entry, customer service work, and employee work scheduling.

6. In or around April 1995, Carmen Sanchez, complainant's sister, began working for respondent J & J King of Beepers as a pager programmer. Sanchez's duties included programming and activating the paggers, acting as cashier, and answering customer service telephone calls.

7. Complainant and her sister have a very close relationship. They have lived together in the same house for most of their lives, including the period of time when they both worked for respondent J & J King of Beepers.

8. In April 1995, Gabriel Olmos was a Customer Service Manager at the Los Angeles store. Olmos, who began his employment with respondent J & J King of Beepers in November 1994, supervised complainant and Carmen Sanchez.

9. The Los Angeles store has two floors. Respondent Alsezh's office, which contains 17 monitors used by him to view the employees' work stations, is on the first floor. Complainant's office was on the second floor. Carmen Sanchez

worked mainly on the first floor but occasionally worked on the second floor.

10. In April 1995, respondent Alsezh was in the Los Angeles store and met complainant for the first time. Respondent Alsezh came into complainant's office and stated, "So you are the new employee that Gabriel [Olmos] hired?" He asked complainant, "What do you think about Hawaii?" Complainant responded by stating that she did not understand what he meant. Respondent Alsezh then walked around to the back of complainant's chair and began massaging her shoulders. Respondent Alsezh said, "Your boss would give you time off of work to go to Hawaii." Complainant understood respondent Alsezh's comments to mean that he was her boss and that he wanted her to go to Hawaii with him. Complainant was surprised and embarrassed by this conduct. She could feel the blood rush to her head and she became flushed. Seeing that complainant was embarrassed, respondent Alsezh commented, "See, I got you. I made you blush."

11. In or about June 1995, respondent Alsezh gave complainant a raise in salary from \$8.00 to \$9.00 per hour. Beginning around this time, respondent Alsezh was "extremely nice" and "overfriendly" with complainant. He often asked complainant if she wanted or needed anything, and complainant said no. Respondent Alsezh also complimented complainant's work in front of other employees, which prompted other employees to refer to her as respondent Alsezh's "favorite." Complainant felt very humiliated when this happened in her presence. Respondent Alsezh also referred to complainant as the "best employee" he ever hired.

12. In June 1995 and continuing through September 1995, respondent Alsezh engaged in a variety of unwelcome sexual conduct with complainant. Complainant clearly and unequivocally rejected respondent Alsezh's advances, using a number of different approaches.

a. Respondent Alsezh often touched complainant's shoulders. He also crept up behind her, and tried to press his body against hers. Complainant tried to avoid this conduct by walking the other way when she saw respondent Alsezh coming.

b. Respondent Alsezh often leered down complainant's blouse at her breasts. In response, complainant tried to avoid respondent Alsezh and walked away from him.

c. Respondent Alsezh asked complainant to go out on a date with him on a number of occasions. His requests were made both in person and during telephone conversations. Complainant always refused these offers and told him, "I'm not interested."

d. Respondent Alsezh also came into complainant's office when no one but complainant was there. He sat there, making personal telephone calls and sometimes did nothing other than stare at complainant while she was working. This made complainant so uncomfortable that she wanted to get up and leave the room.

e. When respondent Alsezh engaged in this unwelcome conduct, complainant told him to leave her alone. On numerous occasions she said, "Don't do this," "Don't bother me," or "Leave me alone." She also asked him, "What part of 'no' don't you understand?"

f. To avoid respondent Alsezh's advances, complainant also told him on several occasions that she had a fiancé. Complainant asked respondent Alsezh why he continued to ask her, an engaged woman, out on dates. Respondent Alsezh responded, "In my country, as long as a woman is not married, that means she's, in other words, fair game."

13. During this same time period, complainant struggled with whether she should tell her fiancé about respondent Alsezh's harassing conduct, ultimately deciding against disclosure because she feared what her fiancé might do.

14. During this time period, complainant complained about respondent Alsezh's conduct to her supervisor, Gabriel Olmos, and another manager, Tom Saner. Olmos and Saner gave complainant some advice, but did not investigate respondent Alsezh's conduct.

a. Complainant told Olmos about respondent Alsezh trying to press against her, asking her out on dates, constantly coming upstairs to her office, and making telephone calls to her. Olmos independently witnessed respondent Alsezh frequently talking to complainant and going into her second floor office.

Respondent Alsezh also told Olmos, in a lecherous tone of voice, that he thought complainant was pretty. When complainant complained to Olmos about respondent Alsezh's conduct, Olmos told her, "Just watch your back, be careful, try not to be alone with him."

b. Complainant also complained to Saner, who told her that he would allow her to go outside if things were "bothering" her and she needed "cool-off time."

15. During this time period, complainant also told her sister, Carmen Sanchez, about respondent Alsezh's conduct. Sanchez witnessed her sister's distress at work. In addition, respondent Alsezh told Sanchez about his interest in complainant.

a. Complainant told Sanchez that respondent Alsezh was "bothering" her. Sanchez saw respondent Alsezh with complainant in the Los Angeles store. Sometimes Sanchez saw complainant come down to the first floor from her office crying. When Sanchez asked complainant what was wrong, complainant nodded or rolled her eyes in a manner which Sanchez understood to mean that respondent Alsezh was harassing or bothering complainant again.

b. Respondent Alsezh called Carmen Sanchez at work three or four times, asking her to persuade complainant to go out with him. On one occasion, respondent Alsezh asked Sanchez, "Why in the fuck won't your sister go out with me?" Sanchez told respondent Alsezh that complainant was engaged and did not want to go out with anyone. Nonetheless, respondent Alsezh frequently asked Sanchez to transfer his telephone call to complainant and he would then talk to her.

16. In or about September 1995, respondent Alsezh called complainant into his office. He told complainant that he needed a manager for his store in Orange, California, and offered the position to complainant. Complainant told respondent Alsezh that she did not want to go out there because it was too far and because she did not think she was prepared to become a store manager. Respondent Alsezh told complainant that he thought she could do the job and offered to double her salary. When complainant again declined the offer, he offered to triple her salary, which complainant also declined. Then respondent Alsezh told complainant "Don't worry. If it takes me buying you a car to get you there, I'll buy you a car." After talking to complainant about the job offer, respondent Alsezh stuck his

shoeless foot under his desk and touched complainant's leg around her ankle. When complainant realized that respondent Alsezh was touching her leg, she kicked his leg away. Respondent Alsezh asked, "Why did you do that?" and complainant told him that he should not touch what did not belong to him. Respondent Alsezh began laughing and complainant, disgusted that he would try such a thing, left his office.

17. Sometime after this conversation, respondent Alsezh telephoned complainant and told her that he needed her to come to the Phoenix, Arizona store to do the billing. Respondent Alsezh told complainant she would stay with him at his Phoenix condominium for two weeks. Complainant objected that she could not come to Phoenix because it was too far, but respondent Alsezh insisted that complainant had to come. Complainant told respondent that if she were to come, she would need a hotel room and that she wanted to bring a female companion. Respondent Alsezh responded that she could not bring a female companion and that she would have to stay at his condominium. Complainant refused to go to Phoenix under the conditions demanded by respondent Alsezh.

18. In or about September 1995, respondent Alsezh called complainant into his office and showed her several monitors that were receiving pictures from cameras positioned throughout the store, including complainant's office. Respondent Alsezh pointed to a monitor and told complainant that he watched everything she did in her office. Complainant felt "closed in" because she knew she was being watched by respondent Alsezh.

19. Thereafter, complainant began wearing more conservative clothing which covered up her body because she knew that respondent Alsezh could be watching her on the monitors in his office. Complainant also refrained from removing her jacket, hoping this would stop respondent Alsezh from staring at her breasts or down her blouse.

20. Respondent Alsezh had a volatile temper in the workplace. At the Los Angeles store, he yelled at his employees. He also spoke in a loud tone of voice, using offensive, profane or demeaning language to his employees.

21. In or around October 1995, respondent Alsezh became angry and began yelling at the employees at the Los

Angeles store. He told all of them, including complainant, that if they were ten minutes late to work, they would be fired.

22. In or around November 1995, respondent J & J King of Beepers hired Claudia Fernandez as a manager for the customer service department. Fernandez worked at the Los Angeles store through January 1996.

23. In November 1995, respondent Alsezh became increasingly persistent in his requests to complainant to go out with him. He asked complainant on at least five occasions to go out to dinner with him and to a Los Angeles Lakers basketball game. He repeatedly called her on the telephone to ask her out on dates and became angry when complainant rejected his requests.

24. On November 22, 1995, respondent Alsezh was in his office and again called complainant to ask her for a date. Complainant told him, "No. What part of 'no' don't you understand?" Respondent Alsezh then told complainant that he was giving her two weeks' notice to change her plans so that she would have plenty of time to prepare to go to dinner and to a Lakers game with him. Following this telephone call, respondent Alsezh came to complainant's office and again asked her to go out. Complainant again told him no. Respondent Alsezh told her that she was "being mean" and pinched her side very hard, causing her to move away from him.

25. In or about November 1995, complainant and Gabriel Olmos were working late. Respondent Alsezh came into the room and asked them if they wanted a drink. Respondent Alsezh brought sodas to them and pressed one against complainant's arm. Complainant pulled her arm away from respondent Alsezh and told him she did not want a soda. Complainant continued working, losing track of where everyone was in the room. Olmos left the room briefly and respondent Alsezh then pressed himself against complainant's back. Complainant told respondent Alsezh to leave her alone and he stepped away. Complainant continued working, believing respondent Alsezh had moved away from her. Olmos returned and saw respondent Alsezh begin to grab complainant's buttocks. Complainant turned around and saw Olmos push respondent Alsezh's hand away. Respondent Alsezh left the room. This incident made complainant "sick to her stomach," angry, and wanting to leave the office.

26. In December 1995, complainant attended respondents' Christmas party. Respondent Alsezh did not allow his employees to bring other guests, such as spouses or fiances.

As complainant was leaving the party, respondent Alsezh stopped her at the front door. In front of the other employees, respondent Alsezh said, "Doesn't she [complainant] look beautiful tonight?" Respondent Alsezh then asked complainant for a hug and a kiss. She said no. Respondent Alsezh then asked complainant, "What about a handshake" and, in an effort to leave, she consented to the handshake. Respondent Alsezh then grabbed complainant's hand, pulled her around, pressed against her, and kissed her in front of several other employees, including Carmen Sanchez and Gabriel Olmos. Complainant pushed away from respondent Alsezh and he began to laugh. Complainant felt sick and began to cry. Carmen Sanchez took complainant home. Complainant remained upset.

27. While working for respondents, at least twice a week complainant called her mother, who was in New York, and talked to her mother about the "pressures" she felt from respondent Alsezh's conduct. Complainant, who told her mother about all of respondent Alsezh's offensive conduct, sought advice and comfort from her mother, in an effort to deal with the emotional stress she was experiencing while working for respondents. During many of these telephone calls, complainant began to cry because it was difficult for her to tell her mother about respondent Alsezh's conduct.

28. In the beginning of 1996, respondent Alsezh again asked complainant to go out to dinner and to a Lakers game. Complainant was not feeling well that day and rudely rejected his offer. Respondent Alsezh asked her why she was talking so loud, stating that other people would hear them. Complainant replied that she did not care if other people heard her. Respondent

Alsezh then threatened complainant, saying "Don't worry. You're going to get yours too."

29. After the beginning of 1996 and sometime before the end of March 1996, respondent Alsezh told complainant that she was the "worst employee" he had ever hired. This made complainant feel that her accomplishments at the Los Angeles store were now ignored by respondent Alsezh because she had rejected his advances.

30. Around the end of March 1996, respondent Alsezh called complainant and again asked her to go out with him. When complainant rejected his offer, he hung up the telephone, but then called back. During the second call, respondent Alsezh told complainant that, when he was back in the Los Angeles store, "You and the rest of the bunch of motherfuckers over there are going to be out on your asses."

31. On April 10, 1996, complainant collected money from her co-workers to buy a cake for a co-employee's birthday celebration the next day. That evening after work, complainant purchased the cake. Complainant often bought cakes for birthday parties at the Los Angeles store.

32. On April 11, 1996, complainant and Carmen Sanchez were scheduled to be at work sometime between 8:00 a.m. and 8:30 a.m. Their car broke down, requiring it to be moved to a gas station for repairs. Both complainant and Sanchez called the Los Angeles office, reporting to several people, including co-employee Menasche Kogman, that they would be late. Respondent Alsezh arrived in the Los Angeles office at approximately 9:00 a.m. This was the first time he had been in the Los Angeles store since his last conversation with complainant around the end of March. Upon his arrival, respondent Alsezh observed a line of customers who were waiting to get their pagers activated, a task which Sanchez performed for respondents. Respondent Alsezh became upset, worrying that he would lose business. Respondent Alsezh knew that Sanchez and complainant drove to work together. Thereafter, respondent Alsezh went to the time clock and pulled both Sanchez's and complainant's time cards and terminated both employees. Several hours later, complainant and Sanchez arrived at work with the birthday cake. Upon arrival, Kogman told them that respondent Alsezh had fired them. After unsuccessfully attempting to talk with respondent Alsezh about the termination and after obtaining their paychecks, complainant and Sanchez left the premises. Respondent Alsezh terminated complainant's employment with respondents as of April 11, 1996.

33. Around May 1996, Gabriel Olmos ceased his employment with respondent J & J King of Beepers.

34. While working for respondents, complainant frequently worked less than 40 hours a week and was paid only for

the hours she actually worked. She worked an average of 35 hours a week.

35. Complainant remained unemployed from April 11, 1996, through November 19, 1996. During that period, she diligently sought employment from numerous employers, including Great Western Bank, Pitney Bowes, and T.C.I. In searching for employment, complainant answered newspaper advertisements, faxed resumes to potential employers and did walk-in interviews with numerous employers.

36. On November 20, 1996, complainant began working as a data entry clerk for MGM Diamond and Company for \$7.50 per hour. Complainant worked for MGM Diamond and Company until March 1997, when she voluntarily resigned to work at Calhono Freight beginning March 3, 1997. At Calhono Freight, complainant earned \$9.38 per hour, a higher wage than what she had been making at respondent J & J King of Beepers.

37. As a result of respondent Alsezh's sexual conduct toward complainant, complainant suffered from nightmares and insomnia, having difficulty sleeping for a number of days.

38. Complainant's relationship with her fiancé was affected by respondent Alsezh's harassing conduct at work. She did not tell her fiancé about the conduct until almost one year after it occurred and the relationship then suffered because she had not told him earlier. Her fiancé questioned the trustworthiness of their relationship because she had not told him about the harassment.

39. Complainant also suffered from bouts of tearfulness and anxiety. She became more defensive and not as trusting in the workplace setting. She also became angry more easily, and has tended to "fly off the handle" since her experience working for respondents.

40. At all times throughout complainant's employment, respondent J & J King of Beepers did not have an anti-sexual harassment policy, and did not display the Department's anti-discrimination posters. In addition, respondents did not provide any sexual harassment training.

41. In this case, complainant attended one day of her own deposition, one day of respondent Alsezh's deposition, a one-day settlement conference, and three days of hearing. She had to take both paid vacation and unpaid time off work from her job at Dean Witter to attend these events. Complainant earned \$396.50 for a five-day work week at Dean Witter.

DETERMINATION OF ISSUES

Liability

The Department alleges that: 1) respondent Alsezh, the owner of respondent J & J King of Beepers, subjected complainant to verbal, visual, and physical acts of sexual harassment; 2) respondent Alsezh retaliated against complainant by terminating her for resisting the sexual harassment; 3) respondents failed to take all reasonable steps to prevent harassment from occurring; and 4) respondents failed to implement a policy and procedure for addressing complaints of sexual harassment. The Department asserts that respondents thereby violated Government Code section 12940, subdivisions (a), (f), (h), and (i).

A. Sexual Harassment

The Department claims that respondent Alsezh sexually harassed complainant in violation of Government Code section 12940, subdivisions (a) and (h). Sexual harassment constitutes discrimination "because of sex" within the meaning of the Act. (Gov. Code, §12940, subds. (a), and (h)(3)(C); Cal. Code of Regs., tit. 2, §§7287.6, subd. (b), and 7291.1, subd. (f)(1); Rojo v. Kliger (1990) 52 Cal.3d 65, 73, fn. 4; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 19 [1990 WL 312871; 1990-91 CEB 1]; DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03, at pp. 28-29 [1984 WL 54283; 1984-85 CEB 2].) If a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, that this conduct led to the deprivation of an employment benefit or benefits, and that respondents can be held liable for these actions, respondents will have engaged in unlawful sexual harassment.

1. Work Environment Sexual Harassment

Complainant, like all employees, is entitled to the benefit of a "discrimination-free workplace," a work environment

free of harassment. (Cal. Code of Regs., tit. 2, §§7286.5, subds. (f), and (f)(3), and 7287.6, subd. (b).) Unwelcome sexual conduct that deprives an employee of this substantial benefit is itself unlawful under the Act, whether or not the conduct also results in the loss of some more tangible employment benefit, such as a promotion, pay increase, or the job itself. (Cal. Code of Regs., tit. 2, §7287.6, subd. (b); Peralta Community College Dist. v. Fair Employment & Housing Com. (1990) 52 Cal.3d 40, 52; Rojo v. Kliger, supra, 52 Cal.3d at p. 73, fn. 4; Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 608.)

a. Whether Unwelcome Sexual Conduct Occurred

The Department asserts that respondent Alsezh subjected complainant to continual unwelcome sexual comments, advances, and physical touchings. This behavior, if it occurred, constitutes the kind of hostile sexual conduct that may form the basis for a sexual harassment violation under the Act. (Cal. Code of Regs., tit. 2, §§7287.6, subd. (b)(1), and 7291.1, subd. (f)(1); Peralta Community College Dist. v. Fair Employment & Housing Com., supra, 52 Cal.3d at p. 45, fn. 2; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at pp. 607-608; DFEH v. Bee Hive Answering Service (1984) FEHC Dec. No. 84-16, at p. 18 [1984 WL 54296; 1984-85 CEB 8].)

Complainant clearly and credibly testified that respondent Alsezh engaged in recurrent instances of unwelcome sexual conduct toward her, as described in the Findings of Fact.

Complainant's demeanor, manner, and attitude on the witness stand was that of a truthful person. Complainant testified that

respondent Alsezh rubbed her shoulders while making suggestions about going to Hawaii together, physically pressed and brushed himself against her, touched her shoulders, looked down her blouse, told her that he watched her on the monitor in his office, pinched her, grabbed at her buttocks, kissed her at the Christmas party, touched her leg with his foot under the desk in his office, repeatedly asked her to go on dates, and pressured her to stay with him in his Phoenix condominium.

Complainant's testimony was corroborated by two other witnesses -- Carmen Sanchez and Gabriel Olmos. Both witnesses testified that they observed respondent Alsezh kiss complainant at the Christmas party, something which respondent Alsezh denied

doing. These witnesses, as well as witness Claudia Fernandez, also corroborated other testimony by complainant, including respondent Alsezh's repeated requests to complainant for dates, his looking down complainant's blouse, his touching her on various occasions, his being in her second floor office, and his talking with her on numerous occasions .

In their closing brief, respondents largely argue that complainant and the Department's corroborating witnesses were either not credible or did not provide evidence in support of the Department's position. Respondents' argument is not persuasive.

Notably, on the issue of whether respondent Alsezh harassed complainant, respondents' closing brief does not attack the credibility of corroborating witness Carmen Sanchez, but instead argues that Sanchez "offers little to support the pattern of harassment." This, however, is not the case. Sanchez testified that, during telephone conversations with respondent Alsezh, he told Sanchez that he had asked complainant out on dates and wanted to know why complainant would not go out with him. Sanchez also testified that complainant told her about respondent Alsezh's date requests and his attempts to look down complainant's blouse, testimony which corroborates complainant's account of events. Moreover, Sanchez witnessed complainant crying and appearing upset at work. This evidence is consistent with complainant's testimony that she became distraught at work because of respondent Alsezh's unwelcome advances.

Gabriel Olmos also corroborated complainant's testimony. Olmos testified that he saw respondent Alsezh repeatedly enter complainant's work area and talk with her. Olmos also testified that he saw respondent Alsezh attempt to grab complainant's buttocks. In addition, Olmos testified that respondent Alsezh, in a lecherous tone of voice, told Olmos that he thought complainant was pretty. Olmos, who was complainant's supervisor, also verified that complainant had complained to him about respondent Alsezh's harassing conduct.

Respondents argue that Gabriel Olmos is not credible, claiming that Olmos is a disgruntled ex-employee. At hearing, however, Olmos exhibited a reluctance to testify, demonstrating a visible fear of retribution from respondent Alsezh. The Hearing Officer finds that this reluctance, as well as Olmos's general demeanor, is inconsistent with respondents' characterization of

Olmos. Respondents also attempt to discredit Olmos by arguing that his testimony is inconsistent with that of other witnesses, including complainant. This argument is not convincing, however, because it largely depends upon a narrow reading of certain portions of testimony, rather than on an assessment of the testimony in the context of the entire record.1/

1/ For example, respondents argue that Olmos is not credible because he testified to an allegation which complainant did not make -- i.e., that respondent Alsezh offered complainant more pay if she would go out with him. Reading the record as a whole, however, Olmos' testimony is consistent with complainant's testimony. Complainant testified that respondent Alsezh gave her "special treatment," such as offering her a promotion at triple her salary, during the period of time period when he also was asking her to go out with him.

Finally, respondents argue that complainant gave false testimony at hearing, citing a number of examples which involve complainant's recall of dates and specific details of events. Credible witnesses, however, often have difficulty remembering dates and, when pressed for specifics, may honestly differ in their recall of details. Here, complainant provided sufficient testimony about respondent Alsezh's conduct, and specific instances of this conduct, to make her credible, even if some of her dates and details were incorrect.¹/ In light of complainant's demeanor and her testimony as a whole, as well as the credible corroboration of her account, respondent's contention about her credibility on this ground is not persuasive.¹/

2/ For example, respondents asked the Hearing Officer to take judicial notice of the Los Angeles Lakers game schedule, and argue that respondent Alsezh could not have asked complainant to Lakers games from June through September because the basketball season runs from November through April. Yet, complainant's testimony at hearing makes clear that she had difficulty "pinpointing" dates, but that she did the best she could to recall when things happened. This, coupled with complainant's testimony that respondent Alsezh also asked her for dates to activities other than a Lakers game, makes her testimony credible on this issue. Other examples cited by respondents, such as whether she danced at the Christmas party, similarly involve complainant's recall or lack thereof of details of some events. Again, this is insufficient to merit a finding that complainant did not give a credible account of respondent Alsezh's harassing conduct.

3/ Respondents also argue that complainant is not credible because her testimony about why she was late on the date of her termination differs with that of other witnesses. Specifically, respondents argue that complainant is not credible because she and her sister testified that they were late because they had car trouble on the date of their termination, while Menasche Kogman and Adi Zur, respondent Alsezh's niece, testified that Sanchez had called in "sick." This decision finds that complainant's and her sister's explanation of these events is more plausible, particularly since complainant had taken on the responsibility of bringing in a birthday cake that day and, in fact, arrived with the cake in hand, an unlikely item to bring to work if

Respondent Alsezh categorically denied that he engaged in any unwelcome sexual comments, conduct or touching of complainant. Specifically, he asserted that he never asked complainant for any dates, never touched or tried to touch complainant, and never tried to kiss her. Moreover, respondent Alsezh asserted that he was rarely present at the store, that he seldom left the first floor when he was at the store, that he did not speak to non-management employees, and that he spoke with complainant only on two occasions during her employment with respondent J & J King of Beepers.

Respondent Alsezh's absolute and categorical denial of all this conduct, including events which were witnessed by others, sheds much doubt on his credibility. For example, respondent Alsezh denied that he had much contact with complainant, but witnesses established that respondent Alsezh was in the Los Angeles office on numerous occasions, and that he had many conversations with complainant in her second floor office. For example, Manager Claudia Fernandez testified that, on numerous occasions, she saw respondent Alsezh talking to complainant and in complainant's office, facts corroborated by complainant and other witnesses. Similarly, respondent Alsezh denied kissing complainant at the Christmas party, but two witnesses testified that they saw the kiss. Respondent Alsezh's categorical denial of all events alleged, even those witnessed by other people, make his testimony not credible.

At hearing, four co-worker witnesses -- Shoshana Factor, Randy Willis, Menashe Kogman, and Adi Zur -- testified on behalf of respondents. On the issue of whether the harassing conduct occurred, these witnesses testified that they did not see respondent Alsezh talk with, kiss, or otherwise sexually harass complainant. Several of these witnesses also testified that complainant did not tell them about respondent Alsezh's harassing conduct. As is often true in sexual harassment cases, most of the charged incidents occurred in the absence of eyewitnesses. Thus, it is not surprising that complainant's co-workers did not witness many of the events. (DFEH v. Fresno Hilton Hotel, supra, 1984-85 CEB 2, at p. 25.) A co-worker's failure to observe

she and her sister had called in "sick" that day.

harassing conduct, however, does not prove that the conduct did not occur. Similarly, the fact that complainant did not tell every co-worker about respondent Alsezh's harassing conduct does not prove that the conduct did not occur.

For all of these reasons, it is determined that respondent Alsezh engaged in unwelcome sexual conduct toward complainant, as testified to by complainant and her corroborating witnesses and described in the Findings of Fact.1/

b. Deprivation of Discrimination-Free Work Environment

Unwelcome sexual conduct deprives its victim of a discrimination-free work environment when the conduct is sufficiently severe or sufficiently pervasive to alter the conditions of the complainant's employment by creating an intimidating, oppressive, hostile, abusive or offensive work environment or otherwise interfering with the complainant's emotional well-being or her ability to perform her work. (Rojo v. Kliger, supra, 52 Cal.3d at p. 73, fn. 4; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at pp. 607-610, citing Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 64-65; DFEH v. Fresno Hilton Hotel, supra, 1984-85 CEB 2, at pp. 29, 32-33.)

This standard is met here. Throughout complainant's year of employment with respondents, respondent Alsezh subjected her to a severe and pervasive pattern of visual, verbal, and physical conduct which upset, offended, demeaned and humiliated her. Respondent Alsezh created an offensive and oppressive work environment for complainant by repeatedly asking her out on dates, touching her, looking at her breasts, and generally

4/ At hearing, counsel for respondents objected on relevancy and First Amendment grounds to evidence about a billboard which advertised J & J King of Beepers. The Hearing Officer did not rely upon any of the billboard-related evidence in coming to the decision in this case.

upsetting her peace of mind. Respondent Alsezh's persistent intimidating and offensive advances, despite complainant's continual rejection, interfered with her ability to do her job and her emotional well-being, so that she became distressed at work and unable to sleep at night.

Respondent Alsezh's harassment of complainant was severe, in that it involved numerous physical touchings, as well as pervasive, in that it occurred on a frequent basis. Respondent Alsezh's unwelcome sexual conduct therefore rendered complainant's work environment hostile, abusive and offensive. 1/

Therefore, it is determined that the unwelcome sexual conduct complainant suffered deprived her of a discrimination-free workplace within the meaning of the Act, in violation of Government Code section 12940, subdivisions (a) and (h).

2. Termination and Retaliation

The Department also alleges that respondent Alsezh's unwelcome sexual conduct ultimately led to the deprivation of another employment benefit, complainant's job itself. The Department asserts that respondent Alsezh fired complainant in retaliation for her opposition to the sexual harassment, in violation of Government Code section 12940, subdivisions (a), (f), and (h). 1/

5/ Complainant and witness Claudia Fernandez testified at hearing that Pat Moore, a co-worker, had told each of them that respondent Alsezh had asked her to shake her breasts for him. Case law suggests that when a complainant has knowledge of a respondent's harassment of other employees, such evidence may be admissible on the issue of whether that complainant was subjected to a hostile work environment (Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511) or whether respondent had a discriminatory animus toward women (Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475). Because other evidence in this case sufficiently established that there was a hostile work environment, however, this decision does not rely upon the asserted out-of-court statements of Pat Moore.

6/ Respondents argue that because complainant was an "at will" employee, respondent Alsezh had the absolute right to

To establish a violation under Government Code section 12940, subdivisions (a) and (h), the Department must prove by a preponderance of the evidence that a causal connection exists between complainant's resistance to the unwelcome sexual conduct and an adverse action taken against her by respondents. The Department need not show that complainant's resistance was the sole or even the principal reason for the adverse action. A violation is established if the action was caused at least in part by the unlawful motive. (Watson v. Dept. of Rehabilitation (1989) 212 Cal.App.3d 1271, 1289-90; DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at pp. 19-20 [1985 WL 62898; 1984-85 CEB 16].)

To establish a retaliation violation under Government Code section 12940, subdivision (f), the Department must prove by a preponderance of the evidence that complainant engaged in a protected activity, that she suffered an adverse employment action, and that a causal connection exists between the protected activity and respondents' adverse action. (Gov. Code, §12940, subd. (f); Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 476-77; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at p. 614; DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 33; DFEH v. Cal. State University - Hayward (1988) FEHC Dec. No. 88-18, at pp. 20-22 [1988 WL 242650; 1988-89 CEB 6].)

Here, the Department established a causal connection between complainant's resistance of respondent Alsezh's unwelcome conduct and his subsequent termination of her employment. The evidence showed that in 1995, respondent Alsezh favored complainant and, during the same time period, made unwelcome advances toward her. The evidence also established that, by 1996, respondent Alsezh had become angry with complainant for

terminate her employment. As discussed herein, however, the Act provides that complainant's termination is unlawful if it is caused, even in part, by an unlawful discriminatory motive.

rebuking his advances and, after making a series of hostile and threatening remarks towards her, terminated her employment.

In 1995, respondent Alsezh repeatedly praised complainant's work, prompting other employees to call her his "favorite." He called her the "best employee" he had ever hired. He raised her salary and, in September 1995, offered her a promotion to manager of his store in Orange, California, promising to double or triple her current salary. Thereafter, he also asked her to join him in Phoenix, offering her a two-week business trip on the condition that she stay with him in his Phoenix condominium.^{1/}

During the same time period, respondent Alsezh continued to press his sexual advances on complainant. For example, when offering complainant the managerial promotion, he touched her leg with his shoeless foot. He made other physical overtures towards her, and continued to ask her for dates. By November 1995, respondent Alsezh's requests had become more persistent, asking complainant out to dinner and a Lakers game on at least five occasions.

The evidence also shows that by 1996, respondent Alsezh had become angry that complainant had rejected his overtures, and, because of this, he began to treat her differently. Sometime in early 1996, respondent Alsezh told complainant, "You're going to get yours too," after she refused to go out on a date with him. Also, sometime during early 1996, but before complainant's termination, respondent Alsezh told complainant

^{7/} The connection between respondent Alsezh's "favoritism" toward complainant and his resulting expectations is exemplified by their discussion of the Phoenix trip. After telling complainant that he needed her to go to Phoenix for two weeks to do some "billing" work, respondent Alsezh also said she would be staying at his Phoenix condominium. Despite complainant's stated refusal to make the trip, respondent Alsezh insisted that she go. This prompted complainant to tell him that she wanted to stay at a hotel and bring a female companion. Respondent Alsezh insisted, however, that she stay in his condominium. Ultimately, complainant refused to go Phoenix under these conditions.

that she was the "worst employee" he had ever hired, a comment which was inconsistent with his earlier repeated commendation of her work throughout 1995. Finally, the record established that, during their last telephone conversation, in March 1996, complainant rudely rebuked respondent Alsezh's request for a date. He hung up on her but, significantly, immediately called her back and told her that she and the other "motherfuckers" at the Los Angeles store were "going to be out on your asses." The

next date that respondent Alsezh was in the store, April 11, 1996, he terminated complainant's employment.

Close proximity of an adverse action to an employee's resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive. (Fisher v. San Pedro Peninsula Hospital, *supra*, 214 Cal.App.3d at p. 615; DFEH v. Northrop Services, Inc. (1983) FEHC Dec. No. 83-11, at p. 9 [1983 WL 36460; 1982-83 CEB 12]). The timing is particularly compelling here, in that respondent Alsezh terminated complainant's employment the very next time he was in the store after their March telephone conversation when she refused to go out with him.

While respondent Alsezh asserts that he terminated complainant and her sister because they were late, the totality of the evidence shows that he was motivated, at least in part, by complainant's consistent refusal of his advances. Significantly, during their last conversation before complainant's termination, respondent Alsezh made clear that he would retaliate against complainant because of her refusal to go out with him. This was consistent with his remarks about "getting her" after she rebuked him on an earlier occasion in 1996.

Therefore, it is determined that respondent Alsezh retaliated against complainant by terminating her employment on April 11, 1996, at least in part, because she had resisted and rejected his sexual advances.

3. Respondents' Liability

An employer is strictly liable under the Act for the harassing conduct of its agents and supervisors against any of its employees. (Gov. Code, §12940, subd. (h); Cal. Code of Regs., tit. 2, §§7286.6, subd. (b), and 7287.6, subd. (b)(2); Farmers' Insurance Group v. County of Santa Clara (1995) 11

Cal.4th 992, 1014; Kelly-Zurian v. Wohl Shoe Company (1994) 22 Cal.App.4th 397, 414-15; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at p. 608, fn. 6.)

It is undisputed that respondent Alsezh was the owner of respondent J & J King of Beepers and had supervisory authority over complainant. Respondent J & J King of Beepers is therefore liable for respondent Alsezh's sexual harassment of complainant.

Respondent Alsezh is also personally liable under Government Code section 12940, subdivision (h), which provides that it is unlawful for an employer "or any other person" to harass an employee or applicant for employment. Government Code section 12925, subdivision (d), defines "person" to include one or more individuals. Respondent Alsezh is thus personally liable for his sexual harassment of complainant. (Matthews v. Sup. Ct. of Los Angeles Co. (1995) 34 Cal.App.4th 598, 603; Page v. Sup. Ct. of Sacramento Co. (1995) 31 Cal.App.4th 1206, 1212; DFEH v. Lake County Dept. of Health Services (1998) FEHC Dec. No. 98-11, at pp. 28-29 [1998 WL 750899; 1998-99 CEB 1].)

Therefore, it is determined that respondent Alsezh and respondent J & J King of Beepers are each liable for respondent Alsezh's sexual harassment of complainant, in violation of Government Code 12940, subdivisions (a) and (h). It is further determined that respondents are each liable for respondent Alsezh's retaliatory termination of complainant, in violation of Government Code section 12940, subdivisions (a), (f), and (h).

B. Failure To Take All Reasonable Steps Necessary To Prevent Harassment

The Department also charges that respondents have violated the Act by failing in their affirmative duty, under Government Code section 12940, subdivisions (h) and (i), to take all reasonable steps necessary to prevent unlawful harassment from occurring.^{1/} Respondents have an ongoing obligation,

8/ When the Legislature added subdivision (i) to the Act, it made this statement about subdivisions (h) and (i):

It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which

independent of any claim or proof of actual harassment, to "establish affirmative programs which include prompt and remedial internal procedures" for handling sexual harassment complaints.^{1/} (DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 28-29; Flait v. North American Watch Corp., supra, 3 Cal.App.4th at p. 478.)

The weight of evidence established that respondents did not have a sexual harassment policy that was distributed to its employees. Witnesses for both the Department and respondents testified either that no policy existed or that they were not aware of any such policy. Respondents did not produce credible testimony to rebut these witnesses. The record also established that respondents did not post the Department poster or provide training on sexual harassment.

The lack of any policy, including any guidelines on how to complain about sexual harassment, had obvious ramifications in this case. Although complainant complained to supervisors Gabriel Olmos and Tom Saner, neither supervisor took any steps either to investigate or to provide a remedy for her complaints. Olmos simply told complainant to "be careful" and

allegations of prohibited harassment and discrimination may be filed, timely and efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by their nonsupervisors and clientele. To further this intent, the Legislature enacts this act. (Stats. 1984, ch. 1754, §1, p. 1170.)

9/ As of January 1, 1993, all employers have an additional affirmative obligation to inform their employees about the illegality of sexual harassment. (Gov. Code, §12950.) The Department did not charge a violation of this section and thus it is not addressed in this decision.

Saner said he would give her permission to go outside if she was upset.

Thus, it is determined that respondents failed to meet their affirmative obligations to take reasonable preventative measures to prevent harassment within the meaning of Government Code section 12940, subdivisions (h) and (i).

Remedy

A. Make-Whole Relief

In its accusation, the Department requested an award of back pay, out-of-pocket expenses, damages for emotional injury, an administrative fine and affirmative relief.

Having established that respondents discriminated against complainant in violation of the Act, the Department is entitled to those forms of relief to make complainant whole for any loss or injury she suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondents must demonstrate any bar or excuse they assert to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code of Regs., tit. 2, §7286.9; DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 33-34.)

1. Back Pay

Complainant is due back pay she lost as a result of her unlawful termination by respondents. Back pay ordinarily encompasses the amount complainant could have been expected to earn had she continued to work for respondents but for the discrimination. Respondents have the burden to prove by a preponderance of the evidence that no pay is due complainant in some or all of the back pay period and to prove any offsets to complainant's earnings. (Gov. Code, 12970, subd. (a); DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 36-37; DFEH v. Del Mar Avionics, Inc., supra, 1984-85 CEB 16, at pp. 26-27.)

Complainant worked, on average, approximately 35 hours per week during the time she was employed by respondents.^{10/} She earned \$9.00 per hour when she was terminated on April 11, 1996.

After respondents terminated complainant, she was unemployed from April 12, 1996, through November 19, 1996 -- a period of 31 weeks. During this period, complainant diligently, but unsuccessfully, sought employment. Complainant contacted numerous employers, including Great Western Bank, Pitney Bowes, and T.C.I. Thus, complainant is entitled to recover back pay for the 31-week period she was unemployed from April 12, 1996, through November 19, 1996.

The evidence also showed that on November 20, 1996, complainant began earning \$7.50 per hour as a data clerk for MGM Diamond and Company, and remained employed in this capacity until March 3, 1997, a period of 14 weeks. On March 3, 1997, complainant began working for Calhono Freight as a data entry clerk making \$9.38 per hour.

This decision finds that complainant is entitled to the difference between the \$9.00 per hour salary she earned working for respondents and the \$7.50 per hour salary she earned during the 14 weeks she worked for MGM Jewelry and Company from November 20, 1996, until March 3, 1997. Complainant is not, however, entitled to back pay after she began working as a data entry

^{10/} While the Department contends that complainant worked 40 hours per week for respondents and is entitled to back pay based on a forty hour work week, the evidence showed that complainant frequently worked less than 40 hours a week and was paid only for hours actually worked. Based upon complainant's testimony and time cards admitted into evidence, this decision finds that complainant worked, on average, 35 hours per week while working for respondents.

clerk for Calhono Freight on March 3, 1997. Calhono Freight paid complainant \$9.38 per hour, a higher hourly wage than her wage with respondents.

Thus, complainant's back pay period begins on April 12, 1996, the date after she was terminated by respondents, and ends on March 3, 1997, the date she began working for Calhono Freight.

Respondents will be ordered to pay complainant back pay for the 31 weeks she remained unemployed after her termination. Based on a pay rate of \$9.00 per hour at 35 hours per week, this portion of the back pay award totals \$9,765.00. Additionally, respondents will be ordered to pay the pay differential during her 14 weeks of work with MGM Jewelry and Company. Her rate of pay at MGM Jewelry and Company was \$7.50 per hour, \$1.50 per hour less than she made at respondents. Based on a 35-hour work week, this totals \$735.00.

In sum, respondents will be ordered to pay complainant a total back pay amount of \$10,500.00. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the date the earnings accrued until the date of payment. (Code of Civ. Proc., §685.010.)

2. Out-of-Pocket Expenses

The Department seeks reimbursement of lost wages for six days not worked by complainant because she attended proceedings related to this case. Specifically, complainant attended the following proceedings: one day of her own deposition; one day of respondent Alsezh's deposition; one day of a settlement conference; and three days of hearing.

Lost wages, such as those resulting from attending a hearing, can be awarded as out-of-pocket expenses, a type of actual damages which are compensable for violations of the Act. (DFEH v. Madera County, supra, 1990-91 CEB 1, at p.39; DFEH v. Robert Daniel Peverly (1991) FEHC Dec. No. 91-05 [1991 WL 370085; 1990-91 CEB 6, at p.12.])

Here, the evidence showed that complainant took off six work days for activities connected to this proceeding, using either accrued vacation time or without pay. This decision will reimburse complainant for five of these days -- those used to attend her own deposition, the settlement conference, and the hearing. This decision will not, however, order reimbursement

for complainant's attendance at respondent Alsezh's deposition. While a complainant can voluntarily attend a respondent's deposition, the complainant is not legally required to do so.

The evidence showed that complainant was earning \$396.40 for a five-day work week at the time of these events. Accordingly, respondents will be ordered to pay \$396.40 as lost income. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

3. Compensatory Damages

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 10-14 [1988 WL 242635; 1988-89 CEB 4].)

Respondent Alsezh's sexual harassment of complainant, as well as his subsequent termination of her, had both immediate and long term effects on complainant, as described in the Findings of Fact. Respondent Alsezh subjected complainant to a pattern of unwelcome sexual comments and conduct from April 1995 through March 1996, and then terminated her in early April 1996.

Initially surprised and embarrassed, complainant became increasingly distressed by respondent Alsezh's conduct, often feeling disgusted, demeaned, and humiliated. After respondent Alsezh leered at her breasts and made repeated advances, complainant sought to avoid being in his presence. This, however, was impossible. Respondent Alsezh came into complainant's second floor office, and, when not at the Los

Angeles store, made phone calls to her at work. Moreover, respondent Alsezh made it clear that he was watching her on his private monitors -- making her feel "closed in" and wanting to wear more conservative clothes to cover herself up. Respondent Alsezh's later physical overtures made complainant "sick to her stomach" and wanting to flee from his presence.

Outside the office, respondent Alsezh's conduct impacted two important personal relationships in complainant's life -- those with her fiancé and her mother. She was afraid to tell her fiancé about the harassment, creating a lack of trust in their relationship after she finally told him about respondent Alsezh's conduct. Complainant's conversations with her mother became consumed with talk about respondent Alsezh's conduct. During many telephone calls with her mother, complainant would cry because it was difficult for her to tell her mother about some of respondent Alsezh's offensive conduct.

At hearing, complainant's sister and Gabriel Olmos corroborated complainant's emotional distress. During her own testimony, complainant's demeanor evidenced her emotional distress, as she cried during portions of her testimony.

Complainant suffered from insomnia and nightmares resulting from respondent Alsezh's harassing conduct. She was tearful and anxious. She also became more defensive and not as trusting in her relationships with co-workers. Complainant also feels more angry and has the propensity to "fly off the handle a lot" since her experience working for respondents.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondents will be ordered to pay complainant \$30,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

B. Administrative Fine

The Department also seeks an order awarding an administrative fine "to vindicate the purpose and policy of the law." The Commission has the authority to order administrative

findings where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, expressed or implied, as required by Civil Code section 3294. (Gov. Code, §12970, subd. (d).) The amount of the administrative fine, in combination with any amount awarded to compensate for emotional distress, cannot exceed \$50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).) The monies derived from any administrative fine awarded are to be deposited in the state's General Fund. (Gov. Code, §12970, subd. (d).)

In determining the appropriate amount of an administrative fine to award, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of employees; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse; or multiple violations of the Act. (Gov. Code, §12970, subd. (d).)

There is clear and convincing evidence that respondent Alsezh's conduct meets the standard for awarding an administrative fine. Respondent Alsezh's continuous sexual harassment of complainant was oppressive. Complainant clearly indicated to respondent Alsezh that his attentions were unwanted and yet he persisted in an ongoing campaign of requests for dates, touchings, and other unwelcome harassing behavior.

Respondent Alsezh's sexual harassment was also willful and intentional. He repeatedly subjected complainant to unwanted touchings, leering, and invitations, in conscious disregard of her requests and her rights. Respondent Alsezh also intimidated complainant by his harassment, particularly since he was the owner of the company, with ultimate power over her employment status. In the end, he used that power to terminate complainant's employment.

Respondents will be ordered to pay to the state's General Fund an administrative fine of \$5,000. Respondents will be jointly and severally liable to pay this fine. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

C. Other Relief

In the accusation, the Department requests that respondents be ordered to develop and implement an effective written policy against sexual harassment, to train their staff with respect to this policy, and to post a notice informing their employees of their rights under the Act and of respondents' unlawful conduct toward complainant. These additional forms of relief are appropriate.

1. Anti-Harassment Policy

Respondents will be ordered to develop and implement a written policy that prohibits sexual harassment and which complies with the requirements of Government Code section 12940, subdivision (h). This policy must be in writing and must be given to all of respondents' employees. It must at a minimum contain the following elements:

- a. A clear and comprehensive description of the kinds of conduct that constitutes sexual harassment and a forceful statement that such conduct is prohibited by respondents' rules and by state and federal law;
- b. A clear statement of any employee's right to complain about sexual harassment without fear of retaliation, and a procedure for making such complaints;
- c. A procedure for promptly, fully, and objectively investigating complaints of sexual harassment and determining their merits; and
- d. A statement that forceful and appropriate measures will be taken to punish offenders and redress the harm done to their victims, and

guidelines and procedures for doing so.

2. Posting Policy and Notice

To inform their employees that unlawful harassment is forbidden and that relief from it is available, respondents will be ordered to post conspicuously copies of their written anti-harassment policy. Respondents will be ordered to post a notice acknowledging their unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations with regard to unlawful discrimination under the Act (Attachment B).

3. Training Program

Respondents will further be ordered to implement a training program to inform their employees fully of the nature of prohibited harassment, the duty of all employers and supervisors to prevent and eliminate harassment in the workplace, and the procedures and remedies available under their anti-harassment policy and state and federal law. This training program shall be conducted by someone other than respondent Alsezh. Respondents shall secure advance approval from the Department of the form and content of this training program, and the Department will monitor its implementation. (DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 40; DFEH v. Del Mar Avionics, supra, 1994-95 CEB 16, at p. 34.)

ORDER

1 Respondent J & J King of Beepers and respondent Juda Alsezh shall immediately cease and desist from harassment and discrimination based on sex.

2 Within 60 days of the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall pay to complainant Sonia Mercado back pay in the amount of \$10,500 for wages lost by complainant between April 12, 1996, and March 3, 1997, together with ten percent interest

thereon, compounded annually, from the date the earnings accrued to the date of payment.

3. Within 60 days of the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall pay to complainant Sonia Mercado out-of-pocket expenses in the amount of \$396.40, together with ten percent interest thereon, compounded annually, from the effective date of this decision.

4. Within 60 days of the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall pay to complainant Sonia Mercado actual damages for emotional distress in the amount of \$30,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

5. Within 60 days of the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall pay to the state General Fund an administrative fine in the amount of \$5,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

6. Within 10 days of the effective date of this decision, respondent Juda Alsezh shall sign notices which conform to Attachments A and B of this decision and shall post clear and legible copies of these notices in a conspicuous place where employees view employee notices. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material. The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachment B shall be posted permanently.

7. Within 60 days after the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall create and implement a written policy on unlawful harassment conforming to the description on pages 31 and 32 of this decision. Respondent J & J King of Beepers shall give a copy of this policy to each employee and shall permanently post clear and legible copies of the policy next to all posted copies of the notice conforming to Attachment B. Posted copies of this policy shall not be reduced in size, defaced, altered, or covered by other material.

8. Within 60 days after the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall create and implement a training program to inform its employees of the nature of prohibited harassment, the duty of all employers and supervisors to prevent and eliminate harassment, and the procedures and remedies available under respondent J & J King of Beepers own policy and state and federal law. Respondent J & J King of Beepers and respondent Juda Alsezh shall secure advance approval from the Department of Fair Employment and Housing of the form and content of the training, which shall be conducted by someone other than respondent Juda Alsezh. The Department shall monitor the implementation of this training program.

9. Within 100 days after the effective date of this decision, respondent J & J King of Beepers and respondent Juda Alsezh shall in writing notify the Department and the Commission of the nature of their compliance with sections two through eight of this order. Respondents shall also notify the Department and Commission of any change of address and telephone number.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: December 31, 1998

—

Jo Anne Frankfurt
Hearing Officer

Attachment A

NOTICE TO ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH

J & J KING OF BEEPERS

posted by Order of the
FAIR EMPLOYMENT AND HOUSING COMMISSION
an agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that J & J King of Beepers and Juda Alsezh violated the Fair Employment and Housing Act. (DFEH v. J & J King of Beepers, et al. (1998) FEHC Dec. No. 99-02.)

As a result of this violation, J & J King of Beepers and Juda Alsezh have been ordered to post this notice, and to take the following actions:

- a. Pay a monetary award to the complainant for back wages, out-of-pocket expenses, and damages for emotional distress.
- b. Pay an administrative fine to the state General Fund.
- b. Post a statement of employees' rights and remedies under the Fair Employment and Housing Act.
- c. Create and implement a formal written policy and training program on sexual harassment.

DATED:

BY

Juda Alsezh, Owner
J & J King of Beepers

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

Attachment B

J & J KING OF BEEPERS

HARASSMENT

YOUR RIGHTS AND REMEDIES
under the
CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT PROHIBITS HARASSMENT BECAUSE OF RACE, RELIGIOUS CREED, COLOR, NATIONAL ORIGIN, ANCESTRY, PHYSICAL AND MENTAL DISABILITY, MEDICAL CONDITION, MARITAL STATUS, SEX AND AGE. YOU HAVE THE RIGHT TO BE FREE OF ALL SUCH HARASSMENT IN YOUR WORKPLACE.

SUCH HARASSMENT may take various forms, including:

- VERBAL CONDUCT such as epithets, derogatory comments, slurs, unwanted sexual advances, invitations or comments
- VISUAL CONDUCT such as derogatory posters, cartoons, drawings or gestures
- PHYSICAL CONDUCT such as assault, blocking normal movement, or interference with work directed at you because of your sex or other protected basis
- THREATS AND DEMANDS to submit to sexual requests in order to keep your job or avoid some other loss, and offers of job benefits in return for sexual favors
- RETALIATION for having resisted or reported the harassment

The law prohibits any form of protected-basis harassment that impairs your working ability or emotional well-being at work. You may have a claim of harassment even if you have not lost your job or some other benefit.

ALL EMPLOYEES ARE PROHIBITED FROM HARASSING, not just supervisors.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT SUCH HARASSMENT AND GET RELIEF.

J & J King of Beepers has a policy against harassment which is posted next to this Notice. If you think you are being harassed on the job because of your sex, race, ancestry or other protected basis, you should use the procedures outlined in this policy to file a complaint and have it investigated.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such harassment in employment. If you think you are being harassed or that you have been retaliated against for resisting or complaining about harassment, you may file a complaint with the Department at:

Department of Fair Employment and Housing
611 West Sixth Street, #1500
Los Angeles, CA 90017
(213) 429-6799
or 1-800-884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the harassment stopped and can require your employer to reinstate you and to pay back wages and other out-of-pocket losses, damages for emotional injury, administrative fines or punitive damages, and other appropriate relief.

DATED:

BY

JUDA ALSEZH

J & J KING OF BEEPERS

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